JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

Loo Ting Meng v Public Prosecutor

A

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–143 OF 2011(J)
HASHIM YUSOFF, SURIYADI, AHMAD MAAROP, ZAINUN ALI AND JEFFREY TAN FCJJ
10 OCTOBER 2013

B

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Murder — Circumstantial evidence — Whether evidence adduced showed that accused person and deceased were together at all material times when murder took place — High Court found accused person guilty and convicted and sentenced him to death — Decision affirmed by Court of Appeal — Whether conclusion that appellant killed deceased supported by cogent and tangible evidence — Whether conviction and sentence imposed on appellant affirmed

D

In the High Court, the appellant was charged for murder, an offence under s 302 of the Penal Code. Three partly burnt body parts of a woman were found at three different locations and were confirmed to be one Choke Swee Fong ('the deceased'). According to a receptionist ('SP7') of Hotel Meyah ('the hotel'), the appellant had checked into the hotel together with a Chinese woman and was given Room 101. The next day, he changed his room to Room 105 and two days later, he had requested to change rooms and moved to Room 103. According to another witness, SP14, the appellant informed him that he was on his way to lodge a report on the deceased. SP14 seized from the appellant a hotel receipt, his mobile telephone, a key room to 103 and his purse. SP12, the police officer who examined the three rooms occupied by the appellant, testified that in Room 105 he recovered, inter alia, a bloodstained blanket ('P76') and hair confirmed to be that of the deceased's as well as cigarette butts disclosing the appellant's DNA profile. According to another witness, SP14, the appellant informed him that he was on his way to lodge a report on the deceased. SP14 seized from the appellant a hotel receipt, his mobile telephone, a key Room 103 and his purse. In Room 103, SP12 recovered hidden in the ceiling of the toilet a bloodstained handsaw ('P36') and a cleaver ('P39') bearing blood stains confirmed to be that of the deceased's. The deceased's car key was also in the appellant's possession. At the end of the trial, the High Court found the appellant guilty and sentenced him to death and the decision was affirmed by the Court of Appeal. Hence, the present appeal.

E

F

G

H

I

Held, dismissing the appeal:

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

(1) There was also overwhelming evidence that the deceased was in Room 105 on the material date, murdered there, dismembered there and the body parts disposed off outside the hotel within a short period at three different locations (see para 18).

(2) The fact that the deceased's blood was found on the cleaver could only point to one direction that the cleaver was indeed used to strike the deceased. The fact that the deceased was also tied at the back and her mouth taped, which resulted in asphyxia, merely confirmed the murderous intention of the killer beyond doubt. The deceased had died two to three days prior to the discovery of the partly burnt parts of the body, with the dismemberment naturally having taken place after her death. The handsaw which had blood of the deceased on it, must have been the instrument used to dismember the body into three parts. The factor of hiding the cleaver and the handsaw in the ceiling of a room, which was not part of the crime scene, pointed to the said items having been used in the killing and dismemberment of the deceased. Had they been unused instruments, bought for some innocent purpose, the appellant would not have risked his life climbing the ceiling to hide them from view. By hiding P36 and P39 in the ceiling, the appellant was attempting to cover his tracks. Furthermore, by being in possession of the deceased's car key, the implication was that the appellant was with the deceased during the relevant period. The information where the car was parked must have been elicited from the deceased when they were together (see paras 19–22).

(3) The irresistible conclusion that the appellant had killed the deceased was supported by cogent and tangible evidence. The singular factor of extreme injury inflicted on the deceased's throat with a cleaver was more than ample to bring the act of the appellant squarely under any of the sub-paras of s 300 of the Penal Code. Slashing the deceased's throat with a cleaver would qualify as an intentional act by the appellant to desire the deceased's death. From all the preparatory acts undertaken by the appellant, before and after the killing of the deceased, the accused could never be accused of doing anything on mere impulse (see paras 26 & 28).

(4) The appellant had failed to create any reasonable doubt on the prosecution case. The decision of the High Court, affirmed by the Court of Appeal, was correct when it decided that the prosecution had successfully established at the end of the defence case, a case beyond reasonable doubt, whereupon the appellant was found guilty, convicted and sentenced to death. The conviction and sentence imposed on the appellant was therefore affirmed (see paras 36–37).

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

[Bahasa Malaysia summary

Di Mahkamah Tiggi, perayu didakwa atas tuduhan membunuh, kesalahan di bawah s 302 Kanun Keseksaan. Tiga bahagian tubuh wanita sebahagiannya terbakar telah dijumpai di tiga lokasi berbeza dan telah disahkan adalah seorang yang bernama Choke Swee Fong ('si mati'). Menurut penyambut tetamu ('SP7') Hotel Meyah ('hotel'), perayu telah mendaftar masuk ke hotel bersama-sama dengan seorang perempuan Cina dan telah diberikan Bilik 101. Pada keesokan harinya, dia menukar biliknya ke Bilik 105 dan dua hari kemudian, dia telah meminta untuk menukar bilik dan berpindah ke Bilik 103. Menurut satu lagi saksi, SP14, perayu telah memaklumkan kepadanya bahawa perayu dalam perjalanan untuk membuat laporan terhadap si mati. SP14 telah mengambil daripada perayu resit hotel, telefon bimbit, kunci Bilik 103 dan dompetnya. SP12, pegawai polis yang memeriksa ketiga-tiga bilik yang dihuni oleh perayu, memberikan keterangan bahawa di dalam Bilik 105 dia menemui, antara lain, selimut yang mempunyai kesan darah ('P76') dan rambut yang disahkan milik si mati dan juga puntung rokok yang mendedahkan profil DNA perayu. Di dalam Bilik 103, SP12 menemui tersembunyi di siling tandas gergaji tangan yang mempunyai kesan darah ('P36') dan pisau pencincang ('P39') yang berdarah disahkan kepunyaan si mati. Kunci kereta si mati juga berada dalam milikan perayu. Di akhir perbicaraan, Mahkamah Tinggi mendapati perayu bersalah dan menjatuhkan hukuman mati dan keputusan itu disahkan oleh Mahkamah Rayuan. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan:

(1) Terdapat keterangan yang kukuh bahawa si mati berada di dalam Bilik 105 pada tarikh matan, dibunuh di situ, dikerat di situ dan bahagian badannya dibuang di luar hotel dalam jangka masa yang singkat di tiga lokasi berbeza (lihat perenggan 18).

(2) Fakta bahawa darah si mati dijumpai pada pisau pencincang hanya boleh menunjukkan bahawa pisau pencincang itu telah pun digunakan untuk menyerang si mati. Fakta bahawa si mati telah diikat di belakang dan mulutnya ditampal dengan pita pelekat, yang mengakibatkan afiksia, hanya mengesahkan niat pembunuh untuk membunuh melampaui keraguan. Si mati telah mati dua hingga tiga hari sebelum penemuan sebahagian bahagian tubuhnya yang terbakar, dengan pemotongan yang dilakukan selepas kematiannya. Gergaji tangan yang mempunyai darah si mati semestinya merupakan alat yang digunakan untuk mengerat badan si mati kepada tiga bahagian. Faktor menyembunyikan pisau pencincang di siling bilik, yang mana bukan sebahagian daripada kawasan jenayah, menunjukkan alat itu telah digunakan untuk membunuh dan mengerat si mati. Sekiranya ia adalah alat yang belum digunakan, dibeli dengan tujuan ikhlas, perayu tidak akan menaruhkan nyawanya memanjat siling

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

untuk memyembunyikannya daripada pandangan. Dengan menyembunyikan P36 dan P39 di siling, perayu cuba untuk menutup jejaknya. Tambahan lagi, dengan mempunyai milikan terhadap kunci kereta si mati, implikasinya adalah bahawa perayu ada bersama si mati sewaktu tempoh relevan itu. Maklumat di mana kereta itu diletakkan mesti telah didapati daripada si mati ketika mereka ada bersama-sama (lihat perenggan 19–22).

(3) Kesimpulan yang tidak dapat disangkal bahawa perayu telah membunuh si mati telah disokong dengan keterangan yang menyakinkan dan ketara. Faktor tunggal kecederaan ekstrim yang dibuat pada tekak si mati dengan pisau pencincang adalah lebih daripada mencukupi untuk membawa tindakan perayu ditempatkan di bawah mana-mana sub-perenggan s 300 Kanun Keseksaan. Mengelar tekak si mati dengan pisau pencincang boleh diterima sebagai tindakan sengaja oleh perayu yang menghendaki kematian si mati. Daripada kesemua tindakan terancang yang diambil oleh perayu, sebelum dan selepas membunuh si mati, tertuduh tidak boleh dituduh melakukan apa-apa pada gerak hati semata-mata (lihat perenggan 26 & 28).

(4) Perayu gagal untuk mewujudkan apa-apa keraguan munasabah terhadap kes pendakwaan. Keputusan Mahkamah Tinggi, disahkan oleh Mahkamah Rayuan, adalah betul apabila ia memutuskan bahawa pendakwaan telah berjaya membuktikan di akhir kes pembelaan, suatu kes melampaui keraguan munasabah, maka perayu telah didapati bersalah, disabitkan dan dihukum mati. Sabitan dan hukuman dikenakan atas perayu adalah oleh itu disahkan (lihat perenggan 36–37).

]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Abdullah bin Jacomah v PP [2002] 6 MLJ 324, HC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chandmal & Anor v State of Rajasthan AIR 1970 SC 917, SC (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Woolmington v Deputy PP [1935] AC 462, HL (refd)

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

Legislation referred to

Penal Code ss 300, 300(a), 302

Appeal from: Criminal Appeal No J-05–189 of 2003 (Court of Appeal, Putrajaya)

Chong Joo Tian (JT Chong Assoc) for the appellant.
Noorin bt Badaruddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] The appellant was charged at the High Court with murder under s 302 of the Penal Code and at the end of the trial was found guilty by the learned judge. He was accordingly sentenced to death. The Court of Appeal affirmed the conviction and sentence, hence the appeal before us.

[2] The charge against the appellant reads as follows:

> Bahawa kamu pada 29.04.2003 jam lebih kurang 2.00 pagi di bilik No 105, Hotel Meyah, No 22, Jalan Tekun, Taman Maju Jaya, Johor Bahru, di dalam daerah Johor Bahru di dalam Negeri Johor Darul Takzim, dengan niat telah melakukan kesalahan bunuh hingga menyebabkan kematian ke atas seorang perempuan cina nama Choke Swee Fong KPT No 730115-08-5388 dengan menggunakan senjata sebilah pisau pemotong daging. Oleh yang demikian kamu didapati telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[3] The prosecution's case, traced from the evidence, was as follows.

[4] By 30 April 2003, three partly burnt body parts of a woman were found at three different locations in Taman Johor Jaya, Johor Bahru, with the first partly burnt body part found in a dustbin behind a shop at Jalan Keembong 22, Taman Johor Jaya, Johor Bahru. That partly burnt body was from the waist to the knee. The second location was at Jalan Seroja 45, Taman Johor Jaya, Johor Bharu where the head to the waist was found. The hands of the deceased were found to be tied up to the back and the mouth was taped. The third location was behind a shop at Jalan Tekun, Taman Johor Jaya, Johor Bahru where a pair of human legs wrapped in a bed sheet bearing 'Hotel Meyah' was found in a dustbin. The body parts were confirmed to be that of CHOKE SWEE FONG (ie the deceased holding KP 730115-08-5388), with the identification successfully carried out by one Go Bin Cha ie the deceased's brother-in-law and the deceased's twin sister one Choke Swee Yee.

[5] The case of the prosecution was based on circumstantial evidence as no one saw the appellant committing the offence against the deceased. The High

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

Court at pp 137–139 (paras 9 and 19) of the record of appeal and the Court of Appeal (p 12) in their respective grounds of judgment were clearly aware that the prosecution depended very much on circumstantial evidence to prove its case. The High Court, after undergoing a thorough exercise over certain authorities, which dealt with circumstantial evidence, remarked:

> Jelas daripada kes-kes di atas sekiranya pihak pendakwaan bergantung kepada keterangan mengikut keadaan, maka ia adalah amat berat dan setiap apa keterangan yang hendak diguna pakai hendaklah sesuatu yang tidak boleh disangkal atau digugat yang menjurus kepada kebersalahan tertuduh.

[6] On this evidential approach, the Court of Appeal stated:

> In view of the fact that the evidence adduced against the appellant was circumstantial, it was incumbent upon the court to determine whether the total effect of the evidence leads to the irresistible inference that it was the appellant who committed the crime.

[7] Simply put, the onus on the prosecution where the evidence relied upon is circumstantial, is a heavy one. Any gaps in the evidence will not suffice to lead to a conviction (*Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36). Therefore the prosecution's case should not be long in irrelevancies or short in evidence but by necessity must adduce cogent and cumulative evidence that points irresistibly to the guilt of the accused person. In *Chandmal & Anor v State of Rajasthan* AIR 1970 SC 917 the court remarked that in order to be successful in its prosecution based on circumstantial evidence, the chain of evidence must be so complete as to point unerringly to the guilt of the appellant.

[8] Due to the myriad dates, facts and events that followed, by necessity a need arises for us to approach the case by alluding to the chronology of dates together with the sequence of events. We begin with 27 April 2013 as the starting point.

[9] The hotel register and the evidence of the employees of Hotel Meyah ('the hotel') established that between the period of 27–30 April 2003 the appellant occupied three different rooms on the three different occasions at Hotel Meyah. He began by occupying Room 101 on 27 April 2003, followed by Room 105 on 28 April 2003, and finally Room 103 on 29 April 2003.

[10] SP7, who was a receptionist of Hotel Meyah testified that the appellant checked into the hotel at 7.20am on 27 April 2003, together with a Chinese woman and was given Room 101. He was to change his room to that of Room 105 the next day. SP7 testified that he saw the appellant at the hotel lobby together with a Chinese woman again the next day ie on 28 April 2003 at about

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

2.30am. They went out of the hotel for about an hour and both returned at about 3.30am. He testified that the appellant appeared restless and went immediately upstairs. SP7 further testified that on 29 April 2003 ie two days later at about 2.30am he received another request from the appellant, who at this point in time was occupying Room 105, to change to another his room on the pretext that the air conditioning in the room he was presently occupying was not functioning. This witness complied with the request and gave the appellant Room 103.

[11] Sandran a/l Krishnasamy @ Katha ('SP8'), another hotel receptionist, who was on duty on 27 April 2003 from 4–11pm, testified that at about 6pm of that day, the appellant informed him that the reception of the TV in Room 101 was not clear. The appellant requested for a change of room. SP8 then granted him a change of room, to that of Room 105. The key to Room 101 was promptly returned to SP8. This witness testified that after changing room, the key to Room 105 was never handed over to the counter. An annotation of this change was made on the hotel register. SP8 further testified that when he gave the appellant the key to Room 105, the appellant told him not to clean this room during his occupancy.

[12] In the same vein, SP9, also a receptionist of Hotel Meyah, gave evidence of having seen the appellant with a Chinese lady on 27 April 2003. He saw the appellant again on 29 April 2004. SP10, a cleaner in that hotel likewise also testified that she saw the appellant with a lady friend entering Room 105. This witness did clean up Room 101 after the appellant moved into Room 105 and found that the latter had removed all his things by then. This witness did not enter Room 105 to carry out any cleaning up chores during the appellant's occupancy that is not until the police had completed its investigation.

[13] The next connecting prosecution's witness who saw the appellant was ASP Yusharifuddin bin Mohd Yusop ('SP14'). This witness testified that when he was making his way to Room 103 (ie the last room occupied by the appellant), he met the appellant who was with his girlfriend Choke Swee Yee, (ie the deceased's twin sister). He was then about to get out of the lift. When asked by SP14 as to where he was going, the appellant replied that he wanted to go to the Plentong Police Station. The reason supplied for wanting to go there was because a report had been lodged about Choke Swee Yee's missing sister. SP14 seized from the appellant a hotel receipt, his mobile telephone, a key to Room 103 and his purse. The appellant was then brought to the police station at Plentong where he was arrested and subsequently charged for the murder of the deceased.

[14] In essence, the hotel registry, the room key bearing No 103 seized from the appellant by SP14, the instruction given by the appellant to SP10 not to

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

clean up Room 105 as long as he was occupying it, together with the testimony of all five employees of the hotel who had dealings with or seen the appellant, not only established his presence in the hotel during the material time, it also confirmed that he occupied Rooms 101, 105 and 103 at the relevant points of time from 27–30 April 2003.

[15] ASP Adzli bin Alam Shah ('SP12'), the police officer who examined the three rooms occupied by the appellant, testified that in Room 105 he recovered, inter alia, a blood stained orange coloured towel (exh P74), and a blood stained blue blanket (exh P76). The deceased's hair was also found in this room. Dr Seah Lay Hong, a forensic analyst ('SP15') who conducted a DNA pro filing of the blood stains on the exhibits, confirmed the blood and hair to be that of the deceased. This witness also confirmed that cigarette butts picked up in Room 105 disclosed the appellant's DNA profile. On the last finding, the appellant's counsel conceded in his submission in the following manner: 'Since the appellant was a hotel guest who occupied Room 105 at the material times, his DNA profile would necessarily be found in Room 105'. This finding and concession confirmed that not only was Room 105 registered under the appellant's name but that he had also physically occupied it. Lastly, SP12 found a polyclinic card carrying the deceased's name in Room 105. This personal document merely piled up the strands of evidence pointing to the deceased having been in that room during the occupancy of the appellant on 29 April 2003.

[16] In Room 103, SP12 recovered hidden in the ceiling of the toilet a blood stained handsaw (exh P36), wrapped up in a local Chinese vernacular newspaper dated 28 April 2003 (P38) and a cleaver (P39), also bearing blood stains. The blood on P36 and P39 upon examination by SP15, who had also examined P74 and P76, confirmed the presence of the deceased's DNA profile on them, though it was together with that of an unknown male.

[17] The DNA profiling, which confirmed the deceased's blood on P74 and P76, and the towel bearing the hotel logo used to wrap up the deceased's legs established the prosecution's case that the killing took place in the hotel. The fact that the exhibits including the splashes of blood were found in the hotel room, reduced the possibility of the murder being committed outside the hotel.

[18] How the deceased entered Room 105 or how the dismembered parts of the deceased body were surreptitiously smuggled out of the room are non-issues. In fact that conclusion is commonsense in the circumstances of the case. What is pertinent is that there was overwhelming evidence that she was in Room 105 on the material date, murdered there, dismembered there and the body parts disposed off outside the hotel within a short period at three different

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

locations. To ensure that the deceased was beyond recognition the dismembered parts were burnt, albeit unsuccessfully.

[19] SP18, a forensic pathology specialist opined that the hidden cleaver ie P39 could have been used to kill the deceased. The fact that the deceased's blood was found on the cleaver, as confirmed by SP15, could only point to one direction ie the cleaver was indeed used to strike the deceased. If a knife qualifies as a dangerous weapon, a cleaver clearly over qualifies as a dangerous weapon that could kill anyone if struck on a vital spot on the body. Anyone who uses such a weapon on another person must have every intention to kill. In this case the fact that the deceased was also tied at the back and her mouth taped, which resulted in asphyxia as confirmed by SP18, merely confirmed the murderous intention of the killer beyond doubt. SP18 also confirmed that the cause of death of the deceased was due to neck injuries, as the deceased's trachea had been cut 4cm below the 'vocal chords'. This witness opined that the deceased had died two to three days prior to the discovery of the partly burnt parts of the body, with the dismemberment naturally having taken place after her death.

[20] The handsaw ie exh 36, which had blood of the deceased on it, by sheer logic, must have been the instrument used to dismember the body into three parts. So, what about the bone splinter found on the handsaw that held the DNA of a male person, one may ask. Surely if the mystery man had been slashed or by some misfortune had foolishly hurt himself on the material date in Room 105, his blood stain would have been recovered together with the other blood stains there. Having considered the totality of the evidence we hold the view that this piece of bone was an old one lodged in the handsaw. We refrain from making further conjectures about this bone except to state that this unknown male DNA contributor is a non-issue. It had in no way diluted the prosecution's case especially in regard to the blood of the deceased found on the handsaw.

[21] The factor of hiding the cleaver (P39) and the handsaw (P36) in the ceiling of a room, which was not part of the crime scene, points to the said items having been used in the killing and dismemberment of the deceased. Had they been unused instruments, bought for some innocent purpose, the appellant would not have risked his life climbing the ceiling to hide them from view. The deceased's blood found on them confirmed the conclusion that these instruments were indeed used by the appellant. It was obvious to all and sundry that by hiding P36 and P39 in the ceiling the appellant was attempting to cover his tracks.

[22] The final significant strand of evidence that connected the appellant to the deceased was the latter's car key in his possession on 29 April 2003. Ng Kim

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

Fooh ('SP1') testified to meeting the appellant on 29 April 2003 at about 1.30pm and seeing the appellant being in possession of a car key. The appellant had asked him to call a taxi as he wanted to go to Taman Pelangi to pick up a car. They boarded a taxi and then proceeded to a car park to pick up a vehicle bearing registration No AED 2987. SP1 was told by the appellant that the car which they picked up by using the aforesaid key belonged to his girlfriend's sister. By being in possession of the deceased's car key, irrespective whether it was voluntarily or forcibly taken from her, the implication is that the appellant was with her on the material date. The information where the car was parked must have been elicited from the deceased when they were together.

[23] As the appellant was with the deceased during the relevant period prior to his murderous act, it was obvious that he was play acting when replying to SP14 that he wanted to go to Plentong Police Station to check out on a missing person report ie of the deceased. This pretence was a prelude to his attempt to cover his tracks ie to ensure that his being with the deceased on 29 April 2003 at the hotel would never be discovered.

[24] The appellant's counsel made much of the presence of a Chinese lady who was seen with the appellant in that hotel, whom the prosecution failed to identify. Evidentially, SP7 on 28 April 2003 saw the appellant with a Chinese lady as late as 3.30am. SP10 also saw the appellant with a Chinese lady on 28 April 2003 entering Room 105. So, who was she and was it fatal to the prosecution's case when it failed to identify her. We do not wish to make conjectures whether she was the deceased, or Choke Swee Yee ie the girlfriend of the appellant or some other unaccounted lady friend. Had that unidentified Chinese lady been the deceased the issue of identification was a non-issue; if she were an unaccounted lady friend then unless information was supplied to the investigation officer, the police was not expected to go on a wild goose chase and question every woman in Johor Bahru if she had been in that hotel on the relevant date; and had it been Choke Swee Yee she would have met her twin sister in that room and would not remain silent when confronted by SP14 near the lift on 30 April 2003. Regardless of who she was, it could not be taken away from us that the DNA results had successfully established the victim was the deceased who had been killed in Room 105. The identity of this Chinese lady therefore would not in any way make any difference to the victim's identity. The appellant tried to imply that this lady was in some way involved in the murder. At the same time the appellant attempted to exclude himself. But doing this cannot take him very far as the room was registered under his name.

[25] To summarise the prosecution's case, the evidence adduced had established that the deceased was together with the appellant on 29 March 2003 in Room 105 of Hotel Meyah at about 2am. With every opportunity available to him the appellant killed the deceased. Logically the

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

episode must have begun with the victim being subdued and tied up, followed by the taping of her mouth firmly (in fact SP18 had testified that this tape had asphyxiated her); the cleaver slash must have come subsequently as it would be illogical for her to be struck first to be followed by her mouth being taped. After killing her, the body was dismembered into three parts with a handsaw, with the body parts disposed off at three different locations. The cleaver and handsaw were hidden by the appellant in the ceiling of Room 103 though later successfully retrieved by the police. There was an unsuccessful attempt to burn the body parts hence the ability to identify the deceased.

[26] The above irresistible conclusion that the appellant killed the deceased is supported by cogent and tangible evidence, which, inter alia, included the form of instruments used, the witnesses' testimony, the contents of the hotel registry, the behavior of the appellant, and the DNA profile of the deceased on the exhibits recovered.

ANALYSIS OF THE EVIDENCE AT THE PROSECUTION'S STAGE

[27] Each individual strand of evidence adduced by the prosecution here was not only unimpeachable, their combined strength was so strong that if the appellant were to remain silent at the stage of the defence, his conviction under s 302 of the Penal Code would be a certainty. Section 302 of the Penal Code reads that whoever commits murder shall be punished with death. Under s 300 of the Penal Code culpable homicide is murder:

> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death or;
>
> (d) if the person committing the act knows that it is imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[28] The singular factor of extreme injury inflicted on the deceased's throat with a cleaver, which was a dangerous weapon in the circumstances of the case, was more than ample to bring the act of the appellant squarely under any of the above sub-paragraphs. Obviously slashing the deceased's throat with a cleaver would qualify as an intentional act by the appellant to desire the deceased's death (see sub-(a)). Even if by some miracle the deceased had survived when her

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

throat was slashed, death was a certainty when her body was dismembered into three parts. The appellant's demeanour, preparations prior to the killing such as switching rooms, the post facto actions to cover up his deeds after the killing whether by the act of hiding the instruments or instructing the hotel employee not to clean Room 105, circumstances under which the deceased's burnt body parts were disposed off at three different locations etc apart from establishing the appellant's intention to kill, were obviously preparatory acts to escape detection. From all the preparatory acts undertaken by the appellant, before and after the killing of the deceased, the accused could never be accused of doing anything on mere impulse.

[29] Read together with the requirement of s 302 of the Penal Code and the cumulative unimpeachable evidence adduced by the prosecution, it was thus no surprise that the High Court (and confirmed by the Court of Appeal) found that the prosecution had successfully established a prima facie case on a maximum evaluation (*Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85).

THE DEFENCE STAGE

[30] As much as it is always the duty of the prosecution to prove an accused person's guilt, and not the duty of the defence to prove anything, in order to rebut the prosecution's case or his guilt the accused person needs only to cast a reasonable doubt over it (*Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368; *Abdullah bin Jacomah v Public Prosecutor* [2002] 6 MLJ 324). The route of his rebuttal is a matter of his choice. Whether he testifies or not, again is his personal choice and no adverse inference would be drawn by the court on account of that course of action or route taken. He can remain quiet if he so wishes, but naturally such a choice would be unwise, in the light of the maximum evaluation exercise having been undertaken by the court prior to the defence being called. To quote Augustine Paul JCA (co-opted to the Federal Court then) in *Balachandran v Public Prosecutor* at pp 315–316 (MLJ); at p 101 (CLJ):

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal ... Since the court in ruling that a prima facie case has been made out, it must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to be silent he must be convicted ...

[31] Even if the learned judge does not believe or is unwilling to accept the explanation given, there is a duty incumbent upon him to consider whether the defence has somehow raised a reasonable doubt over the prosecution case, as clarified by *Mat v Public Prosecutor* [1963] 1 MLJ 263. Fanciful or imaginary

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

doubt, needless to say, will not do to qualify as reasonable doubt (*Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16). Once reasonable doubt is established at the end of the whole case as to whether the accused person committed the offence, meaning that the prosecution has failed to make out a case beyond reasonable doubt, he is accordingly entitled to an acquittal (*Woolmington v Deputy Public Prosecutor* [1935] AC 462).

[32] The appellant's defence was simple. He admitted that in April 2003, he stayed at Hotel Meyah, Johor Bahru but could not recall the exact date, number of rooms occupied or the room numbers. He went there with three friends, namely Botak, Ah Chong, and another person whose name he could not recall. None of them gave evidence for him. The following day his girlfriend one Choke Swee Yee came to see him at the hotel for a chat.

[33] He admitted being acquainted with the deceased whom he knew had since passed away. He did not know how she died. He denied any altercation with the deceased in Room 105 let alone to injure her. He denied killing or dismembering the deceased into three parts and later disposing the gruesome evidence at three different locations. The all encompassing defence was his denial that the deceased dropped by to see him at Room 105, or in the course of his stay there, ever saw her.

[34] Despite being in the position to cast a doubt over the prosecution's case, the appellant never utilised that opportunity. Pertaining to many of the questions posed, he doggedly replied either of a lapse of memory or lack of knowledge. Why the deceased's hair and polyclinic card were found in Room 105 thus remained unanswered by him despite it being registered under his name. And that predicament equally applies to the blood stains on P36, P39, P74 and P76, which held the deceased's DNA profile found in Rooms 105 and 103 booked by him. How the deceased's car key came into his possession, and how he knew where the car was parked, still remained good evidence stacked against him.

[35] By testifying in the manner that he did, and denying seeing the deceased there at all when occupying Rooms 105 and 103, all the prosecution's important strands of evidence remained unaffected and unrebutted. In the circumstances of the case, it is our view that the appellant's bare denial was not a defence sufficient to cast a reasonable doubt over a host of incriminating evidence that unerringly pointed to his guilt (*DA Duncan v Public Prosecutor* [1980] 2 MLJ 195).

[36] With the want of satisfactory rebuttal evidence adduced by the appellant it was no surprise that the High Court and the Court of Appeal concluded that the appellant had failed to create any reasonable doubt on the

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu Nov 13 12:39:31 2014

prosecution's case. On that premise the High Court — also affirmed by the Court of Appeal — was right when it decided that the prosecution had successfully established at the end of the defence case a case beyond reasonable doubt, whereupon the appellant was found guilty, convicted and sentenced to death.

[37] We likewise hold the view that the prosecution had indeed successfully established a case beyond reasonable doubt. The appeal is therefore dismissed. We therefore affirm the conviction and sentence imposed on the appellant by the High Court.

Appeal dismissed.

Reported by Afiq Mohamad Noor